No. 03-9659

FILED
OCT 28 2004
CLERK

In The Supreme Court of the United States

THOMAS JOE MILLER-EL,

Petitioner,

v.

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

Miller-El claims the State peremptorily struck six veniremen because they were African-American. The State gave race-neutral explanations for the strikes. Thus, under *Batson v. Kentucky*, 476 U.S. 79 (1986), Miller-El had the burden to prove these explanations were a sham and the strikes were the result of purposeful discrimination. The state trial court found that Miller-El did not satisfy this burden.

On federal habeas corpus review, the state court's finding must be presumed correct unless rebutted by clear and convincing evidence. Further, Miller-El is not entitled to habeas relief unless he can show the state court rejection of his claim was based on an unreasonable determination of the facts in light of the evidence. As the court of appeals determined, Miller-El cannot make this showing and he is not entitled to relief.

Miller-El seeks to obscure the issue by focusing on discriminatory practices in other times, in other cases, by other prosecutors. He parses the voir dire record to reach strained comparisons with non-minority jurors. He ignores the realities of jury selection and the innumerable variables that inform the use of peremptory strikes. But the bottom line is the six panelists Miller-El claims were discriminated against each made comments during voir dire that would put any capital prosecutor on notice that they could harbor a bias against the State, regardless of their race. Miller-El has failed to produce clear and convincing evidence that prosecutors purposefully discriminated against them.

STATEMENT OF THE CASE

In the pre-dawn hours of November 16, 1985, Thomas Joe Miller-El and co-defendant Kennard Flowers robbed a Dallas motel at gunpoint. Motel employees Donald Hall and Doug Walker complied with all Miller-El's demands, handing over the cash drawer, opening the combination lock to the bellman's closet, and turning over their own valuable personal property. Miller-El and Flowers then bound and gagged the victims. After Flowers left the scene, Miller-El shot Hall and Walker twice each in the back as they lay face down in the bellman's closet. Hall survived to testify at Miller-El's trial, although Miller-El's shots had severed his spine, rendering him a paraplegic. Walker died on the bellman's closet floor.

Miller-El was indicted for capital murder. Jury selection took place over a span of five weeks in February and March of 1986. During this process, prosecutors peremptorily struck fourteen veniremen, ten of whom were African-American. Miller-El objected to eight of these strikes, asserting that prosecutors were discriminating against African-American veniremen. As to each of these eight, the State proffered its race-neutral, case-related reasons for exercising the challenge. The jury finally selected consisted of two white males, seven white females, an African-American male, a Filipino-American male, and a Latino male.

Miller-El then filed a motion to quash the jury panel based on this Court's opinion in *Swain v. Alabama*, 380 U.S. 202 (1965), arguing that the prosecution had violated the Equal Protection Clause of the Fourteenth Amendment by excluding African-Americans through the use of peremptory challenges. At a pretrial hearing on the

motion, Miller-El presented evidence regarding historical jury selection practices in the Dallas County District Attorney's Office. *See* Joint Appendix (JA) 790-884. The trial judge found that there was no evidence presented indicating any systematic exclusion of African-Americans as a matter of policy by the District Attorney's Office and that Miller-El had failed to establish a *Swain* violation. JA 882-83.

The case proceeded to trial and Miller-El was convicted of capital murder on March 26, 1986. One month later, this Court issued its opinion in *Batson* holding that an equal protection challenge to use of peremptory challenges could be sustained based on the facts of the case alone, eschewing the *Swain* requirement of proof of a pattern and practice of discrimination.[1] On direct appeal, Miller-El challenged the State's strikes of ten African-American veniremen under the *Batson* standard. The Texas Court of Criminal Appeals remanded the case to the trial court with instructions to conduct a *Batson* hearing. JA 888.

At the *Batson* hearing, conducted on May 10, 1988, the defense relied on the evidence it had presented at the *Swain* hearing. JA 893. The State objected to its admission, arguing that the evidence was irrelevant under

[1] In *Batson*, this Court introduced a three-step evidentiary framework for evaluating claims of racial discrimination in jury selection. 476 U.S. at 96-98. First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. *Id.* at 96-97. Second, if the requisite showing has been made, the burden shifts to the prosecutor to provide a race-neutral explanation for striking the venireman in question. *Id.* at 97-98. Third, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Id.* at 98.

Batson since it did not bear on the prosecutors' conduct in Miller-El's case. JA 894. The court overruled the State's objection, however, and admitted the evidence. JA 896. Prosecutors testified regarding their reasons for striking veniremen Paul Bailey and Joe Warren, to which Miller-El had not objected during voir dire, and the State asked the court to take judicial notice of the explanations given during voir dire for its strikes of the remaining veniremen. JA 903-11, 917. The court issued written findings, determining that the prosecution's explanations were race-neutral and negated any inference of purposeful discrimination. JA 924-29.

On appeal, the Texas Court of Criminal Appeals, after independently reviewing the voir dire and the supplemental record, found that the record contained "ample support" for the prosecutors' racially neutral reasons and concluded that the prosecutors' explanations were not "patently implausible or so contrary to the evidence as to be unworthy of belief as a matter of law." JA 930-31. This Court denied certiorari review. *Miller-El v. Texas*, 510 U.S. 831 (1993).

Miller-El advanced his *Batson* claim again in his federal habeas corpus petition, but only as to the six veniremen at issue here. The district court denied relief, concluding that the record supported the trial judge's finding that Miller-El had failed to prove purposeful discrimination. JA 987-92, 966-67. The court of appeals denied Miller-El's request for a certificate of appealability. JA 993.

This Court granted certiorari to review the court of appeals' denial of a COA. 534 U.S. 1122 (2002). In an

opinion issued on February 25, 2003, based on a "threshold examination" of the record, the Court concluded that the federal district court's rejection of Miller-El's *Batson* claim was "debatable" and that the court of appeals erred in not granting a COA on the claim. JA 42. The Court remanded the case to determine whether Miller-El could "demonstrate that [the] state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence, 28 U.S.C. § 2254(e)(1), and that the corresponding factual determination was 'objectively unreasonable' in light of the record before the court." JA 42. Consistent with this directive, the court of appeals granted COA, ordered full briefing on the merits from the parties, and conducted oral argument. Then on February 26, 2004, the court of appeals issued its opinion affirming the district court's denial of relief, concluding that Miller-El had "failed to show by clear and convincing evidence that the state court erred in finding no purposeful discrimination." JA 20. The Court has granted certiorari review of this decision. JA 1052.

SUMMARY OF THE ARGUMENT

Miller-El has failed to show that the state courts' rejection of his *Batson* claim is unreasonable. Therefore, he is not entitled to habeas corpus relief. Furthermore, he has failed to rebut, by clear and convincing evidence, the state court finding that prosecutors did not discriminate against African-American veniremen. Each prospective juror peremptorily challenged by the State had voiced views unfavorable to the State. Furthermore, the record reflects that prosecutors treated similarly situated veniremen

equally, examining them based on their individual views and circumstances, not based on their race.

Moreover, neither Miller-El's evidence of historical discrimination in Dallas County nor the prosecutors' jury shuffle conduct in this case refutes the reasonableness of the state court decision. The historical evidence, while potentially relevant to the issue of discriminatory motive, does not implicate the prosecutors involved in Miller-El's trial and in any event does not strike at the genuineness of the prosecutors' reasons for striking prospective jurors, reasons which are amply supported in the record. Likewise, the jury shuffle conduct – assuming it even supports an inference of discriminatory purpose – offers little to overcome the highly persuasive race-neutral explanations for the State's strikes in this case.

Finally, alleged deficiencies in the state fact-finding process, omissions in the written findings, and errors in subsidiary findings – even assuming they exist – do not vitiate the deference mandated by 28 U.S.C. § 2254(d)(2) and (e)(1). The focus of the habeas court's inquiry is the state court's ultimate decision, not its process. But in any event, the "deficiencies" Miller-El points to are illusory and do not impugn the state court's ultimate determination that prosecutors did not discriminate against African-American veniremen.

ARGUMENT

I. Miller-El Has Failed to Show That the State Courts' Rejection of His *Batson* Claim Is Unreasonable, Nor Has He Rebutted, by Clear and Convincing Evidence, the State Courts' Finding of No Purposeful Discrimination.

A. Prosecutors struck prospective jurors based on their views, not on race.

Miller-El claims that prosecutors purposefully discriminated against six African-American veniremen: Roderick Bozeman, Billie Jean Fields, Joe Warren, Edwin Rand, Carrol Boggess, and Wayman Kennedy. The State gave race-neutral reasons – multiple reasons in several instances – for each of the strikes. Under *Batson*, Miller-El had the burden of proving that these reasons were pretextual and that the strikes were the result of purposeful discrimination. The state courts reasonably determined that Miller-El failed to satisfy this burden.

Carrol Boggess. Miller-El's argument that the strike exercised against Boggess had no legitimate race-neutral reason is belied by the record. It is certainly reasonable, as happened in this case, for prosecutors to exercise a peremptory strike against a juror who equates imposition of the death penalty with "murder," and, unsurprisingly, indicates she is unsure she could impose the penalty. On her juror questionnaire, Boggess answered affirmatively the question "Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being?" Joint Lodging (JL) 44. During individual voir dire, when asked about her views concerning the death penalty, Boggess responded, "Well, I believe I could serve on a case like this, but whether I want to or

not is a different thing. I wouldn't want to serve and I wouldn't want to have that responsibility to do that, but if it fell upon me, I would certainly take it and pray to the Lord to help me get through it." JA 295. She also stated, "I'm not saying that I feel like I could impose the sentence myself – or I'm not going to be imposing the sentence, is that correct?" JA 297.

When asked whether she could vote for death, she stated, "I've never been in that situation. I don't feel like I would want to be in that situation and whether I could do it or not, I'm not real sure."[2] JA 298. Boggess further stated, " . . . but now whether or not I could actually go through with *murder* – with killing another person or taking another person's life, I just don't know. I'd have trouble with that." JA 299 (emphasis added). Boggess ultimately indicated that she would answer the special issues according to the evidence, thus insulating herself from a challenge for cause on that basis. Boggess also indicated on her juror questionnaire that she had testified as a defense witness at her nephew's theft trial. JL 43. The State exercised a peremptory challenge to remove Boggess based not on her race, but rather her hesitancy about

[2] Miller-El argues that the court of appeals erred by relying upon this statement because it was given in response to a question by the prosecution whether Boggess could directly vote for the death penalty, as jurors in Texas were once required to do, rather than whether she could answer the special issues that would be submitted in Miller-El's case. *See* Petitioner's Brief at 40 n.28. But Miller-El misses the point. True, Boggess could not be disqualified from jury service for not being able to directly assess a death sentence. But her negative response to the inquiry could nonetheless gauge the degree of her claimed support of the death penalty and indicate to prosecutors that she might be hesitant to answer the special issues in such a way that a death sentence would result.

assessing a death sentence and the fact that she had served as a defense witness in her nephew's theft trial. JA 312-13.

Wayman Kennedy. Kennedy stated on his questionnaire that he believed in the death penalty "only in extreme cases." JL 51. He echoed that sentiment during individual voir dire: "Well, my feelings are kind of like what I said on the questionnaire, that *I really don't believe in it* only in extreme cases and I would say like a mass murder. Someone broke into this courtroom and killed all of us, I would say yeah, put him to death because that would be a mass murder type situation or in a situation where it was a mutilation, where they come in and cut the body all up or something like that." JA 317-18 (emphasis added).

Kennedy also questioned whether the death penalty could be appropriate punishment for a murder committed in the course of a robbery, the very crime for which Miller-El stood accused: "To me, it would like, if it was just a normal robbery, why wouldn't a life sentence be enough. . . ." JA 319; *see also* JA 321-22. Finally, when asked whether he could answer the special issues "yes" if proved beyond a reasonable doubt, even if he personally felt the defendant should not be sentenced to death, Kennedy replied, "I think I could. . . ." JA 326. The State exercised a peremptory challenge to remove Kennedy because of his hesitancy to assess the death penalty for murder in the course of robbery (for which Miller-El stood accused),[3] his view that the death penalty is only

[3] Miller-El contends that Kennedy "expressed no misgiving about imposing the death penalty in murder-robbery cases *like this one*," implying that the State's concern was unfounded. Petitioner's Brief at

(Continued on following page)

appropriate for mass murder, and the fact that "he hesitated for a great deal of time" before stating that he could answer the special issues according to the evidence. JA 349.

Roderick Bozeman. Bozeman had indicated on his questionnaire that he supported the death penalty and could serve as a juror in a death penalty case. JL 12. But his voir dire examination told a different story. When asked what purpose the death penalty serves, Bozeman responded, "Well, I think *if there's no possible way to rehabilitate a person* and he is harmful to society, you know, the State has that right, I feel." JA 145 (emphasis added); *see also* JA 155. When asked what would indicate to him that an individual was beyond rehabilitation, Bozeman responded, "Oh, I would say somebody mentally disturbed or something like that or say a Manson type or something like that," and he initially denied that evidence of repeated criminal acts of violence would indicate that a person was beyond rehabilitation. JA 146. Perhaps most significantly, Bozeman *classified himself* as the type of person who believes in the death penalty in principle but who could not actually serve on a capital jury. JA 146-47. He admitted at one point that even if the evidence compelled "yes" answers to the special issues, he might refuse to answer the questions honestly in order to avoid imposing the death penalty. JA 157.

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37 (emphasis added). But the record does not support this statement. Indeed, Texas law forbade the parties from questioning prospective jurors regarding the specific facts of the case. Thus, there was simply no opportunity to determine whether Kennedy's general reluctance to vote for death in murder-robbery cases would apply to *this* murder-robbery case. *See* JA 318

Because Bozeman ultimately averred that he could render a verdict according to the evidence, he was not subject to a challenge for cause despite the pro-defense sentiments he expressed. Thus, the State exercised a peremptory challenge to remove Bozeman, citing his views on the death penalty and on rehabilitation, his "obvious hesitation" concerning his ability to override his personal feelings and answer the special issues according to the evidence, and his belief that a prior pattern of conduct would not be sufficient to render a defendant deserving of a death sentence. JA 168. Bozeman's comments put prosecutors on notice that he was an unfavorable juror because of his unusual views on rehabilitation and his doubts regarding his ability to impose the death penalty even if such a result were compelled by the evidence. There is simply no "clear and convincing" evidence that Bozeman's strike was the result of purposeful discrimination.

Billie Jean Fields. Fields stated that he believed in the death penalty and could serve on a capital jury. JA 174-77. Nonetheless, contrary to Miller-El's assertion, he was not an "ideal State's juror." Petitioner's Brief at 35. As reflected both in his questionnaire and in questioning by the State, Fields' brother had served in prison numerous times for drug offenses prosecuted in Dallas County. JL 19, JA 190. Additionally, after noting that the possibility of rehabilitation would be a factor he would consider in assessing a death sentence, JA 182-83, Fields asserted his personal religious belief that *no one* is beyond

rehabilitation.[4] JA 183-84. As Fields concluded, " . . . I feel like, if a person has the opportunity to really be talked [to] about God and he commits himself, whereas he has committed this offense, then if he turns his life around, that is rehabilitation. . . . I feel like when an individual has really been truly reached by someone reading the word of God to him and they are repentant and they do have a real act of contrition, they can be rehabilitated and that's been demonstrated." JA 184. The prosecution exercised a peremptory challenge to remove Fields, citing its concern that Fields' deeply-religious belief in the rehabilitative capacity of all persons could impact his willingness to impose a death sentence, as well as the fact that his brother had been convicted of a felony. JA 197-99.

Miller-El argues that the prosecutors' reasons for striking Fields are pretextual, but that argument is based in part on two significant factual errors. First, Miller-El claims that "the State failed even to raise the issue [of Fields' brother's criminal background] during its examination of Fields," implying that this omission exposes it as a pretext. *See* Petitioner's Brief at 36. But the record shows that the State did, in fact, question Fields about his brother's criminal past. Such questioning confirmed that

[4] Miller-El characterizes Fields' testimony to indicate he believed "nearly everyone" was capable of rehabilitation. Petitioner's Brief at 35. But the voir dire record belies this characterization:

> Prosecutor: Let me ask you, Mr. Fields, do you feel as though some people simply cannot be rehabilitated?
>
> Fields: No.
>
> Prosecutor: You think everyone can be rehabilitated?
>
> Fields: Yes.

JA 183-84.

Fields' brother had been convicted in Dallas County on more than one occasion for possession of a controlled substance and had served time. JA 190. Second, Miller-El contends that "[t]he State's professed concern that Fields would not be able to impose the death penalty because of the dictates of his Catholic faith is manifestly disingenuous" because Fields stated explicitly that he disagreed with his church's opposition to capital punishment. *See* Petitioner's Brief at 36. But the record shows that, in expressing its reasons for striking Fields, *the prosecution made no mention of Fields' Catholic faith*. Rather, Fields' religious-based beliefs regarding *rehabilitation* were cited as reasons for striking him from the panel. JA 197. Therefore, it is Miller-El's argument that is disingenuous.

Miller-El also argues that, because Fields testified he could vote to impose the death penalty even for someone who could be rehabilitated, his "abstract views about rehabilitation had no relevance to his ability to vote for a death sentence." Petitioner's Brief at 35. This argument ignores the sentencing scheme at issue in this case, which queries jurors "Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[5] TEX. CODE CRIM. PROC. ANN. art. 37.071 (1986). The jury must answer this question affirmatively for a death sentence to be imposed. *Id.* Therefore, despite Fields' protestation that he could vote for death even for a person he believed had been rehabilitated, it was

[5] Indeed, when asked what he believed this inquiry meant, Fields responded, "Well, it means is there a possibility that he will continue to lead this type of life, will he be rehabilitated or does he intend to make this a life-long ambition." JA 183.

certainly reasonable for prosecutors to be concerned that, if faced with a criminal defendant claiming repentance, Fields would be predisposed to believe him and to answer the future danger inquiry "no." *See* JA 184-85.

Edwin Rand. "[R]ight now I say I can, but tomorrow I might not." That is how venireman Rand responded when asked whether he could vote to impose the death penalty – an inauspicious portent for a prosecutor seeking the ultimate sanction. Based upon this comment alone, it is unsurprising that the State chose to strike him. Yet Miller-El argues that the State had no legitimate reason to strike Rand, thus its strike constituted purposeful discrimination. This argument is not supported by the record.

Rand indicated on his questionnaire that he believed in the death penalty. JL 36. But at the outset of individual voir dire he described capital punishment as a "touchy subject." JA 262. Further into the examination, the prosecutor asked Rand whether he would describe himself as (1) a person who believes in the death penalty and can serve as a juror and assess the death penalty if warranted; (2) a person who believes in the death penalty but for whatever reason cannot actually participate as a juror and be involved in assessing the death penalty; (3) a person who does not believe in the death penalty but could render a verdict according to the evidence; or (4) a person who does not believe in the death penalty and cannot participate as a juror in the assessment of a death sentence. JA 264-65. Rand described himself as falling "[p]robably in between the first two, sitting in the jury and being able to say, 'Okay, he's guilty.' and being able to do that. But again, somewhere along the line, I would probably think to

myself, you know, 'Can I do this?' You know, right now I say I can, but tomorrow I might not."[6] JA 265. He later affirmed that he could answer the special issues according to the evidence, thus effectively insulating himself from a challenge for cause. JA 268, 289. The State exercised a peremptory challenge to remove Rand, citing his ambivalence about the death penalty generally and his ability to serve on a capital jury. JA 290.

Miller-El argues that Rand's initial uncertainty about imposing a death sentence cannot be a legitimate basis for the State's strike because Rand "subsequently confirmed that he could serve on a capital jury." Petitioner's Brief at 37. But Rand's subsequent assurance that he could vote to impose death was belied by his own warning to prosecutors: "right now I say I can, *but tomorrow I might not.*" JA 265 (emphasis added).

Joe Warren. Although Warren indicated on his questionnaire that he supported the death penalty "[i]n some cases," JL 28, during voir dire examination, he repeatedly answered questions posed by the prosecutor in a noncommittal manner, indicating ambivalence about the death penalty and his ability to impose it. For example, when asked whether he believed in the death penalty, Warren stated, "there are some cases where I would agree, you know, and there are others that I don't." JA 202.2. When the prosecutor described the crimes defined as

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[6] Miller-El omits this statement from his summary of Rand's voir dire testimony, acknowledging only that Rand "expressed some initial uncertainty about his ability to impose the death penalty." Petitioner's Brief at 37. This omission is notable given that Miller-El accuses the court below of "ignoring the portions of the voir dire record" that do not support the state court holding. Petitioner's Brief at 32, 38.

capital murder under Texas law and asked whether Warren felt the death penalty could be an appropriate punishment for such crimes, Warren responded, "Well, there again, I would say it depends on the case and the circumstances involved at the time." JA 204. When asked whether the death penalty serves a purpose, Warren answered, "Yes and no. Sometimes I think it does and sometimes I think it don't. Sometimes you have mixed feelings about things like that." JA 205. In response to the question whether he could make a decision between a life sentence and a death sentence, Warren equivocally replied, "I think I could." JA 207. Likewise, when questioned about his ability to answer the future dangerousness special issue, Warren responded, "I suppose there's always that chance, but there again, you never know." JA 209. Finally, Warren stated, "Well, it's just like I said you know. There are cases, I mean, personally, that I feel I wouldn't want to personally be, you know, involved with it if I had a choice. . . ." JA 211.

The State exercised a peremptory challenge to remove Warren. Notably, Miller-El did not even object to the strike at the time, JA 219, further supporting what is borne out by the record: the State did not strike Warren because he was African-American. At the *Batson* hearing held in the trial court in 1988, the prosecutor specifically cited Warren's hesitation about imposing the death penalty and his inconsistent responses during voir dire as bases for his strike. JA 908-11. Miller-El now argues that the State should not be believed because, despite Warren's wavering, he provided clear answers on two occasions. *See* Petitioner's Brief at 39. But two occasions of clarity can hardly override the incertitude that suffused Warren's voir dire testimony as a whole. That a prospective juror at some

point gives a firm answer to a question does not necessarily eradicate a litigant's concern over repeated expressions of indecisiveness throughout voir dire questioning.

Miller-El fails even to acknowledge another factor that played into the prosecution's decision to strike Warren: The fact that Warren was struck relatively early in the jury selection process when the State still had several peremptory challenges remaining.[7] JA 910-11. As the prosecutor observed, an attorney's strategy regarding the use of peremptory challenges necessarily changes as jury selection progresses: Early in the process, an attorney flush with challenges might feel free to strike a marginal juror; whereas, later in the process, the attorney must be more cautious in expending the precious remaining strikes. JA 914. According to the prosecutor, had Warren been examined when the State had only one strike remaining, the prosecutor would not have exercised a challenge to remove him. JA 910.[8]

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[7] Warren was twenty-eighth of 108 veniremen. JA 135. The State still had nine peremptory challenges remaining after exercising a challenge to remove Warren.

[8] Miller-El does not challenge the State's strikes of the four other African-American veniremen (though he did so in state court). It should be noted, however, that three of the four stated both in their juror questionnaires and during individual voir dire that they were opposed to the death penalty. Mackey (Voir Dire Record (VDR) 10:3949, 3951); Bailey (VDR 11:4110); Keaton (VDR 11:4307-08, 4314). Nonetheless, all three were held qualified under *Wainwright v. Witt*, 469 U.S. 412 (1985), based on their statements that they could render a verdict according to the evidence. The fourth expressed ambivalence about the death penalty and indicated both in her questionnaire and during voir dire that she could not personally assess a death sentence. Baker (VDR 8:2990-91, 2996-97, 2998).

In sum, all but one of the challenged veniremen expressed ambivalence or hesitance about the death penalty either in their questionnaires or during voir dire; in some instances, there were additional considerations that informed the State's strikes, such as pro-defense views on rehabilitation and the criminal histories of family members. The one challenged panelist who had expressed no qualms about the death penalty – Billie Jeans Fields – had a brother with an extensive criminal history in Dallas County and had expressed pro-defense views regarding rehabilitation.

B. Miller-El has failed to identify any white jurors accepted by the State who were similarly situated to the African-American jurors struck by the State.

"The weakness in petitioner's *Batson* claims stems from his difficulty in identifying any unchallenged white venireman similarly situated to the six aforementioned African-American veniremen." JA 45. None of the non-minority veniremen who were selected to serve on Miller-El's jury shared views or circumstances comparable to those of the challenged African-American panelists. Miller-El's assertions to the contrary ignore the voir dire record as a whole and the reality of a jury selection process that requires litigants to assess innumerable variables and intangibles in exercising their peremptory challenges.[9]

[9] Significantly, Miller-El's trial counsel did not even attempt to compare the struck African-Americans with non-minority jurors accepted by the State. *See* JA 921. Indeed, several of the white jurors Miller-El now points to, his trial counsel found objectionable from a defense perspective.

When asked about her views on capital punishment during voir dire, white juror Sandra Hearn stated, "I believe in the death penalty if a criminal cannot be rehabilitated and continues to commit the same type of crime. I do not think anyone should be sentenced to a death penalty on first offense." JA 429. Based on this statement, Miller-El claims Hearn held views about capital punishment and rehabilitation comparable to those held by African-Americans struck by the State. Miller-El's contention is based upon the erroneous implied presumption that Hearn's "first offender" comments were considered in a vacuum. The prosecutors knew Miller-El was no first offender. In 1969, he robbed a business at gunpoint, abducting an employee as he fled in the man's car; he was convicted and sentenced to seven years in prison. Statement of Facts (SF) 4:1301-17. In 1976, he masterminded and participated in a bank robbery in which he and a band of cohorts held bank employees at gunpoint; he was convicted of bank larceny and sentenced to ten years in the federal penitentiary. SF 4:1326-28, 1331-54, 1371-73. Miller-El was released on parole in 1981 but was back in prison within months for violating the terms of his parole. SF 4:1382, 1386. Thus, Hearn's views about the inappropriateness of a death sentence for a first offender presented prosecutors no cause for concern in this case.[10]

Moreover, Hearn unequivocally stated in her juror questionnaire and throughout individual voir dire that she believed in the death penalty and could assess the death penalty in an appropriate case. JL 213; JA 429-32, 450-51.

[10] Hearn had made it clear that the prior offense would not have to be a murder, it could be a robbery or some other lesser criminal act of violence. JA 430, 439.

She also stated unequivocally that she could base a death sentence on the facts of the crime and evidence of prior violent crimes.[11] JA 430, 439. She even revealed her personal feeling that the death penalty should be available for not only murder, but also severe torture and extreme child abuse. JA 430, 451. These are hardly the sentiments of a juror prosecutors are likely to strike in a death penalty case.

Hearn's appeal as a prosecution-friendly juror was also based on her statements that she had great respect for police officers because her father was a retired FBI agent and she had daily contact with police officers through her employment. JA 445-46, 449, 457. Certainly, defense counsel recognized that Hearn was a prosecution-prone juror, because *the defense* submitted her for challenge for cause on numerous grounds. JA 482-83. When the trial judge found her qualified, *the defense* objected to her being seated as a juror and asked for additional peremptory challenges. Indeed, in arguing on direct appeal that the trial judge erred in denying that challenge for cause, defense counsel[12] wrote:

[11] In contrast, struck juror Bozeman testified that he did not believe the death penalty should be imposed as long as there was a chance the defendant could be rehabilitated and that evidence of prior violent conduct was not necessarily an indication that a person was beyond rehabilitation. JA 145-46. Bozeman's views were even more extreme than those of Penny Crowson, a white panelist whom the State peremptorily struck. Crowson had expressed a firm belief in the death penalty but also stated that she would probably not assess a death sentence if she believed there was a chance the defendant could be rehabilitated. VDR 3:1211.

[12] E. Brice Cunningham, who represented Miller-El at trial, also represented him on direct appeal.

> If ever – if ever – there was a Venireperson that should have been excluded for cause from the Jury in this case, or any capital Murder Jury, it was Venirewoman HEARN. It is hoped that the Lord will save us from future jurors with her type of thinking and beliefs. . . . Appellant did not have any remaining Peremptory Challenges to use to exclude [] HEARN, who was truly an objectionable and unacceptable juror, from becoming the twelfth juror in Appellant's case. In fact, Appellant probably would have tried it with eleven, without MS. HEARN. Appellant therefore strongly asserts that severe and devastating harm can be clearly shown and established and is evidenced in the Record in this case in denying Appellant's Challenge for Cause to SANDRA HEARN.

JA 1015-16; *see also* JA 1010 ("By no stretch of the imagination could MS. HEARN be considered qualified as a fair juror in this case."). Thus, this same juror whom Miller-El's trial counsel found utterly objectionable from a defense perspective has been transformed by Miller-El's tortured revisionist history of the voir dire record into a *defense-prone* juror the State was remiss for not striking.

Likewise, Marie Mazza's views regarding the death penalty were qualitatively different than those held by the challenged African-Americans. When asked about her feelings concerning the death penalty during voir dire, she stated, "It's not an easy one and I feel that it depends upon the case, the testimony. . . . It's kind of hard determining somebody's life, whether they live or die, but I feel that is something that is accepted in our courts now and it is something that – a decision that I think I could make one way or the other. . . . Toying with my religious upbringing, my family upbringing and such, it depends upon how I feel

that the testimony was presented to me and that would be something that I would feel like I could do. It's difficult." JA 353-54. Nonetheless, Mazza immediately denied that anything in her religion or upbringing conflicted with her support for capital punishment. JA 354. She ultimately revealed that her earlier statement was grounded in concern for what her acquaintances who were opposed to the death penalty would think of her if she served on a capital jury rather than her own internal views regarding the death penalty. JA 354-55. Thereafter, Mazza stated that the death penalty exists for a reason, commenting that murderers gave their victims no mercy. JA 356. In contrast, African-American panelist Warren was so non-committal in his responses to the State's questioning that it is difficult to determine what his views were on the death penalty. JA 202-11. And when asked whether he could impose the death penalty, African-American panelist Rand responded "right now I say I can, but tomorrow I might not." JA 265.

Miller-El also misconstrues the responses of juror Kevin Duke, who expressed clear support for the death penalty and confidence in his ability to assess it in an appropriate case. JA 373, 377-80, 394. Duke stated he believed that the death penalty was necessary and that it served a purpose, specifically deterrence. JA 372-73. He also testified that he had never felt differently, that he had always believed in having the death penalty. JA 373.

According to Miller-El, Duke indicated ambivalence about the death penalty when he commented that "it really should be up to [the defendant] whether he wants to die or if he wants to stay in prison the rest of his life if he was guilty. . . ." *See* Petitioner's Brief at 33 (citing JA 393). But considered in context, these comments reveal merely

that, if *he* were convicted of murder, he would prefer to be executed rather than serve the rest of his life in prison "being a useless human being." JA 393-94; *see also* JA 372 (" . . . I think you might as well go ahead and give the death sentence instead of life in prison because it's the same thing to me."). Thus, he would allow a criminal defendant to opt for death if faced with the prospect of spending the rest of his life behind bars. These comments simply do not support the proposition that Duke would be at all reluctant to impose death in a given case.

Moreover, Duke's positive views about rehabilitation were made not in the context of testing Duke's ability to assess a capital sentence, but in response to defense counsel's questioning of the juror's ability to disregard the possibility of parole in assessing the minimal allowable sentence (five years) for the lesser-included offense of simple murder.[13] JA 399.[14] In fact, when defense counsel

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[13] It should be noted, however, that Duke also stated, immediately prior to the comment Miller-El refers to, that if he were "governor for the day" he would set the minimum sentence for non-capital murder at five years *without the possibility of parole*. JA 399.

[14] Miller-El also identifies Ronald Salsini as a "similarly situated" juror. *See* Petitioner's Brief at 33-34 n.20. But the record shows that Salsini was a prosecution-friendly panelist, at least in this case. While Salsini did make some comments that could be construed as hesitance about assessing a death sentence in certain circumstances, VDR 5:2249, 2251, 2254, one particular portion of his voir dire clearly set him apart from the challenged veniremen. When asked what types of crimes he felt might warrant a death sentence, Salsini, a former bank teller, volunteered a hypothetical crime that eerily parallels the facts of this case:

> If after [the victim complies with the robber's demands], then a person would shoot them with no real reason or, you know, if there was a threat to the person committing the crime – say he's committing the crime and he's an armed robber and there is no threat to him at all and he stills go

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questioned Duke about his views on rehabilitation in the death penalty context, Duke had this to say: "I feel, if he can commit a murder and not have any feelings about it at all, it doesn't bother him, like he said, swatting a fly, no big deal, then I think it doesn't matter. He's going to do it again." JA 396.[15]

Finally, the non-minority veniremen who had family members with criminal backgrounds are clearly distinguishable from those African-Americans whom the State struck on this basis. Significantly, of the four white panelists Miller-El claims were similarly situated and therefore should have been struck by prosecutors, three were so pro-prosecution that they were struck by Miller-El himself.

Noad Vickery testified that his sister had been arrested and had served time in a California penitentiary when he was a teenager. JA 240-41. Vickery was fifty

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ahead and shoots somebody and kills them, that I think should be punished with capital.

VDR 5:2256. The State accepted Salsini as a juror and *the defense* struck him.

[15] Additionally, the record shows the State pursued challenges for cause to remove numerous non-minority panelists who had expressed opposition to or ambivalence concerning the death penalty. VDR 2:663 (Nelson); 2:716-17 (Sohner); 3:1478 (Berk); 4:1696 (Hinson); 5:2101 (White); 8:3153 (Willard). The State secured the excusal by agreement of two additional non-minority veniremen who had expressed opposition or ambivalence. VDR 6:2542, 2575 (Girard); 6:2638 (Evans). Finally, when challenges for cause were unavailing, the State peremptorily struck three non-minority veniremen who had expressed opposition to or ambivalence concerning the death penalty. VDR 2:485, 523 (Gibson); 2:1018-19 (Holtz); 10:3748 (Whaley). Significantly, the State also peremptorily struck a non-minority venire member who had expressed a firm belief in the death penalty but who also stated that she would probably not assess a death sentence if she believed there was a chance the defendant could be rehabilitated. VDR 3:1211 (Crowson).

years old at the time of jury selection. JL 65. These circumstances are qualitatively different from those of Billie Jean Fields, whom the State struck partially based on the fact that his brother had multiple felony convictions. First, the incident Vickery related obviously occurred many years before Miller-El's trial, whereas Fields' voir dire indicated his brother's problems with the law were ongoing. Second, Vickery's sister's crime, conviction, and incarceration occurred in California (while Vickery lived in Dallas); Fields' brother had served in prison in Texas for crimes committed in Dallas County, the prosecuting authority in Miller-El's case. Third, Vickery related a single criminal incident regarding his sister; Fields related that his brother had been involved in several crimes. Finally, Vickery was a teenager when the incident involving his sister occurred; Fields was an adult. Further, basic voir dire strategy counseled that, even if the State judged Vickery to be a less-than-ideal juror, given the hostility between Vickery and Miller-El's counsel apparent even on a cold record,[16] there was no need for prosecutors to expend a precious peremptory strike to remove a juror defense counsel surely would seek to remove. In fact, *the defense* submitted Vickery for challenge for cause. JA 254. After the trial judge held that Vickery was qualified, *the defense* exercised a peremptory challenge to remove him from the panel. JA 259. Fields and Vickery were not similarly situated.

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[16] *See, e.g.*, JA 245 (Vickery accuses defense counsel of trying to sway him); JA 252 (Vickery: "I'm sorry that my phrasing of things don't [sic] suit you. . . ."); JA 253 (Vickery: "Well, that's what you said. You said to use that as a judgment and that's what I was using." Defense counsel: "I'm not arguing with you."); JA 259 (defense counsel apologizes for "miscommunication").

The remaining non-minority jurors identified by Miller-El were likewise not similarly situated. Cheryl Davis testified that her husband had been convicted of theft in Dallas County ten years earlier and had received a seven-year probated sentence. VDR 9:3469-70. The balance of her voir dire examination reveals that she was otherwise a strong State's juror. VDR 9:3433-3499. *The defense* submitted Davis for challenge for cause. VDR 9:3478. After the trial judge found Davis qualified, *the defense* exercised a peremptory challenge to remove her from the panel. VDR 9:3491, 3499. Chatta Nix testified that her brother, who owned a construction company, had recently entered into a plea bargain with the United States Attorney's Office for his involvement in a well-known white-collar construction loan scandal. VDR 5:2379-80. Nix, who worked as office manager at her brother's company, had also been named in a separate civil lawsuit along with "thousands of others" filed by the Federal Savings and Loan Insurance Corporation. VDR 5:2380-82. Nix's voir dire examination indicates that she was otherwise a strong State's juror. VDR 5:2345-2399. *The defense* exercised a peremptory challenge to remove her from the panel. VDR 5:2399. Finally, Joan Weiner testified that her ten-year-old son had once been arrested for shoplifting and she had to pick him up at the police station.[17] VDR 5:2141, 2158. However, the record indicates Weiner was a good juror for the State because she had relatives in law enforcement and her support for the death penalty was unequivocal. VDR 5:2110-14, 2139, 2147, 2162. These circumstances are qualitatively different from those of Fields and Boggess.

[17] Weiner served on Miller-El's jury.

C. Prosecutors did not engage in disparate questioning based on race.

The lower court also correctly found unavailing Miller-El's attempt to impute discriminatory intent to the prosecutors from the manner in which they questioned prospective jurors. Miller-El accuses prosecutors of singling out African-Americans for certain lines of questioning intended to elicit responses that would justify their removal from the venire. But this assertion does not survive a careful review of the record.

1. Graphic Script

Of the six African-Americans Miller-El claims were peremptorily struck based on purposeful racial discrimination, only two – Carrol Boggess and Wayman Kennedy – were given the "graphic script"[18] at the outset of their voir dire examination by the State. Boggess had indicated on her juror questionnaire that she believed in the death penalty, but that she held beliefs that would prevent her from returning a death verdict. JL 44. Kennedy had written on his questionnaire that he believed in the death penalty "[o]nly in extreme cases, such as multiple murders." JL 51. Therefore, both Boggess and Kennedy had expressed views on their questionnaires that prosecutors

[18] The State questioned all prospective jurors at length regarding their views on capital punishment. With the vast majority of veniremen, prosecutors simply informed them that the State was actively seeking the death penalty and that affirmative answers by the jury to the three questions submitted at the punishment phase would result in Miller-El being given the death penalty, then asked them an open-ended question concerning their feelings on capital punishment. With some prospective jurors, however, prosecutors described an execution in graphic detail.

could legitimately feel the need to probe through focused questioning.

The four other *Batson* jurors – Bozeman, Fields, Warren, and Rand – all indicated unambiguous support for the death penalty in their questionnaires and thus *did not receive* the graphic script at the outset of their examinations. If, as Miller-El claims, *see* Petitioner's Brief at 29, the prosecutors' motive in employing the graphic script was to push African-Americans to express views that would justify striking them, Bozeman, Fields, Warren, and Rand should have been the principal targets. After all, Boggess and Kennedy had already expressed views that would justify striking them.

Miller-El argues nonetheless that the State's use of the graphic script evinces discriminatory motive because prosecutors used it more often with African-Americans, relying upon the fact that prosecutors used the graphic script with eight of fifteen African-Americans, but with only three of forty-nine non-minority jurors. *See* Petitioner's Brief at 25. These figures, of course, fail to take into account the views of prospective jurors, which the record shows diverged widely along racial lines among prospective jurors summoned in this case. Miller-El counters by asserting that, even taking the prospective jurors' views into account, the graphic script was used more frequently with African-American jurors than with non-minority jurors. To this end, he identifies eighteen non-minority jurors who he contends expressed views sufficient to trigger use of the graphic script had its use been race-neutral. *See* Petitioner's Brief at 25 & n.12. Thus, according to Miller-El, the State used the graphic script with seven of ten African-Americans who expressed hesitancy regarding the death penalty, but with only two

of eighteen like-minded whites. Petitioner's Brief at 25. The fallacy in this analysis, however, is that at the point prosecutors decided whether to use the graphic script with a particular juror, the only indication they had of that juror's views was his questionnaire. But the record in this case contains the questionnaires of only three of the eighteen non-minority jurors Miller-El identifies. As Miller-El himself concedes, arguments based on questionnaires not contained in the record are "sheer speculation." Petitioner's Brief at 25.

Miller-El asserts that this gap in the record is not attributable to him because he sought discovery of the remainder of the white jurors' questionnaires in federal district court "but was denied access to this information." Petitioner's Brief at 26 n.13. In fact, by the time Miller-El made his discovery request, the documents were no longer in existence except for the seated jurors' questionnaires. Miller-El fails to explain why he did not make these documents part of the record *in state court* when the documents were unquestionably in existence and when he carried the burden of proving purposeful discrimination.[19]

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[19] Miller-El attempts to shift the blame to the State, noting this Court's observation on original submission that "[h]ad there been evidence obtainable to contradict and disprove the testimony offered by petitioner, it cannot be assumed that the State would have refrained from introducing it." JA 35 (internal citations and quotation marks omitted); *see* Petitioner's Brief at 26. But he fails to take into account the fact that he did not advance his disparate questioning arguments in support of his *Batson* claim until federal habeas corpus proceedings, by which time the remaining questionnaires no longer existed. Thus, Miller-El would have this Court hold against the State a failure to introduce evidence to disprove an argument that had not even been made.

In any event, the questionnaires that are part of the record – those of the twelve seated jurors and those of the ten prospective jurors for whom Miller-El originally raised *Batson* objections – support the conclusion that prosecutors used the graphic script to probe the views of prospective jurors who had given ambiguous or conflicting responses concerning their support for the death penalty on their questionnaires. Prosecutors did not generally utilize the graphic script when the panelists' support for *or opposition to* the death penalty was unambiguous.

Again, the four African-Americans who did not receive the graphic script (whose questionnaires are contained in the record) – Bozeman, Fields, Warren, and Rand – all indicated unambiguous support for the death penalty in their questionnaires. They each answered "yes" to question 56, stating they believed in the death penalty, and "no" to question 58, indicating that their beliefs would not prevent them from imposing a death sentence.[20] *See* JL 12, 20, 28, 36. It was not until subsequent voir dire examination that they expressed reservations.

The African-Americans who did receive the graphic script at the outset of their examinations had given conflicting answers on their questionnaires concerning

[20] The questionnaires submitted to prospective jurors in this case asked the following questions about the death penalty:

56. Do you believe in the death penalty? (yes) (no)
Please explain your answer.

58. Do you have any moral, religious, or personal beliefs that would prevent you from returning a verdict which would ultimately result in the execution of another human being? (yes) (no)

JL 44.

their views on the death penalty. On her questionnaire, Carrol Boggess answered question 56 "yes" but also answered question 58 "yes." JL 44. Wayman Kennedy stated on his questionnaire that he believed in the death penalty "only in extreme cases, such as multiple murders." JL 51. Linda Baker failed to answer question 56 and stated, "[m]y strongest feeling is against the death penalty"; she wrote "undecided" in response to question 58. Defense Exhibit ("DX") 7.[21] Troy Woods circled "no" in response to question 56, but also answered question 58 "no." JL 180. Janice Mackey circled "no" in response to question 56 and added "Thou shall not kill," but then answered question 58 "no." DX 7. In response to question 56, Paul Bailey circled "yes" then wrote in "no," then answered question 58 "no." DX 7. Anna Keaton circled "no" in response to question 56, but then also answered question 58 "no." DX 7.[22]

The seated jurors, whose questionnaires are also part of the record, further support this strategy. All who did not receive the graphic script – Sumrow, Long, Weiner, Mazza, McDowell, Duke, Walsh, Zablan, and Hearn – had answered questions 56 and 58 to indicate unambiguous support for the death penalty.[23] JL 125, 132, 140, 148, 164,

[21] This exhibit may be found in the record of the *Swain* hearing conducted on March 12, 1986.

[22] Jeanette Butler's juror questionnaire is not contained in the record. However, her voir dire examination reveals that while she believed in the death penalty in principle, she was unwilling to participate as a juror in imposing a death sentence. VDR 4:1889.

[23] Miller-El claims that Mazza, Duke, and Hearn made statements on their questionnaires (in explanation of their affirmative answers to question 56) that should have triggered the graphic script. Petitioner's Brief at 28 n.17. Mazza wrote, "Depends on crime – Yes in cases where punishment must be the severest [sic]." JL 148. Duke wrote, "The death

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172, 189, 197, 213. Of the three seated jurors who did receive the graphic script, Gutierrez and Woods had given conflicting answers on their questionnaires concerning their views on the death penalty. JL 205, 180. Indeed, white juror Sztybel was the only juror who had expressed unambiguous support for the death penalty in her questionnaire but was subjected to the graphic script questioning.[24] JL 156. The record simply does not support Miller-El's assertion that prosecutors used the graphic script based on race.

2. Minimum Punishment

Miller-El also accuses the State of questioning African-Americans differently concerning their willingness to

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penalty would be better to me than life in prison, because that is like dieing [sic] every day." JL 172. Hearn wrote, "If a convicted criminal continues to commit crimes after rehabilitation in prison – especially killing people – he is a menace to society and should be disposed of." JL 213. Miller-El ignores the fact that these jurors answered questions 56 and 58 in a manner indicating unambiguous support for the death penalty, unlike the African-American jurors who received the graphic script. Further, these comments are no more provocative than questionnaire comments made by African-American jurors who – like Mazza, Duke, and Hearn – did not receive the graphic script. *See* JL 12, 28, 36.

[24] While the record does not contain the questionnaires of most of the white panelists Miller-El claims should have received the graphic script, their voir dire examinations support the court of appeals' observation that "[t]hey were so opposed to the death penalty there was no need to give them a detailed description in order to find out their thoughts." JA 18. *See* VDR 2:483 (Gibson); 2:603 (Nelson); 2:1016-17 (Holtz); 3:1440-41 (Berk); 4:1646 (Hinson); 5:2053 (White); 6:2520-21 (Girard); 8:3090-91 (Willard). The same holds true for the three death-penalty-opposed African-Americans who did not receive the graphic script. V. Smith (VDR 2:926); Carter (VDR 4:1951-52); Mosley (VDR 7:2654-55).

impose the minimum punishment for the lesser-included offense of murder[25] to create race-neutral reasons for removing African-Americans from the panel. But the record belies this accusation. By the time seven African-Americans were questioned in the challenged manner, they had already expressed views that, while not rendering them subject to a challenge for cause, were unfavorable to the State.[26]

Miller-El contends this line of questioning was racially motivated because it was employed with seven of eight

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[25] With most veniremen, prosecutors identified the minimum penalty first, then asked whether the venire member could impose it. But with some, prosecutors employed a tactic by which they described the offense of murder, then asked what the prospective juror thought the minimum punishment should be, before informing him of the range allowed by law.

[26] Miller-El scoffs at the notion that the State would employ a strategy "normally used by the defense to weed out pro-state members of the venire," Petitioner's Brief at 29 (internal quotation marks omitted), characterizing it as a "disingenuous contrivance. . . . used to accomplish a [] clandestine purpose." *Id.* at 30. *See also id.* at 23 (characterizing graphic script questioning as "covert" tactic). However, at oral argument before this Court on the original submission of the case, counsel for the petitioner conceded that it was "entirely legitimate" for prosecutors to use particular lines of questioning with jurors who had expressed unfavorable views that did not rise to the level of a challenge for cause "to get them to say something that will allow the judge to knock them out for cause" to avoid having to expend a peremptory strike. *Miller-El v. Cockrell*, No. 01-7662, 2002 WL 31415973, at *16-17 (U.S. Oct. 16, 2002).

Further, Texas law allowed the State to challenge prospective jurors on this basis. *See Huffman v. State*, 450 S.W.2d 858, 861-62 (Tex. Crim. App. 1970). And despite Miller-El's description of the tactic as "clandestine," there is nothing in the record to indicate that defense counsel were not fully aware of the State's use of the tactic and the purpose behind it. In any event, the fact that prosecutors employed a "ruse" to attempt to remove unfavorable jurors does not support a finding of purposeful racial discrimination.

African-Americans questioned on the issue, but with only two of thirty-six whites questioned on the issue. However, the record establishes that this disparity is not attributable to race. The record shows that the seven African-Americans who received this line of questioning – Bozeman, Fields, Warren, Rand, Boggess, Kennedy, and Baker[27] – all expressed anti-prosecution views, but were not subject to challenge for cause on that basis. Boggess indicated on her questionnaire that her beliefs would prevent her from voting to impose death, JL 44, and during voir dire examination she characterized an execution as "murder." JA 299. When asked about his views on the death penalty, Kennedy replied, "I really don't believe in it" and stated that he supported it "only in extreme cases" such as those involving mass killings or mutilation. JA 317-18. Bozeman *classified himself* as the type of person who believes in the death penalty in principle but who could not actually serve on a capital jury, JA 146-47, and admitted at one point that he might refuse to answer the punishment special issues according to the evidence in order to avoid imposing death. JA 157. Fields' brother had served in prison numerous times for drug offenses prosecuted in Dallas County, JA 190, and he expressed the view that *no one* is beyond rehabilitation. JA 183-84. Warren was so noncommittal in his responses to the State's questioning that it is difficult to determine what his views were. JA 202-11. When asked whether he could vote to impose death, Rand responded, "right now I say I can, but tomorrow I might not." JA 265.[28] The one African-American who

[27] Miller-El does not challenge the State's peremptory strike of Baker.

[28] Miller-El claims that the court of appeals' finding that these veniremen had expressed anti-prosecution views is "at odds with [its] simultaneous (and correct) finding" that Bozeman, Fields, Warren, and Rand had indicated on their questionnaires unambiguous support for the death penalty, thus explaining the State's decision not to give them the graphic script. *See* Petitioner's Brief at 31. But Miller-El ignores the fact that the prosecution's questioning on minimum sentencing occurred toward the end of its voir dire examination, by which time prosecutors had not only the prospective jurors' questionnaires but also their voir dire responses. Thus, while it is true that the questionnaires of Bozeman, Fields, Warren, and Rand indicated support for the death penalty, their subsequent voir dire examinations revealed pro-defense sentiments.

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received the "friendlier" line of questioning was Troy Woods, whose voir dire clearly identified him as an excellent State's juror.

On the other hand, almost all white panelists who had expressed opposition to the death penalty were struck for cause or by agreement of the parties *without the need to resort to this line of questioning*. VDR 2:663 (Nelson); 2:716-17 (Sohner); 3:1478 (Berk); 4:1696 (Hinson); 5:2101 (White); 8:3153 (Willard); 6:2542, 2575 (Girard); 6:2638 (Evans). The two remaining – Gibson and Holtz – were subjected to the same challenged line of questioning and were peremptorily struck, just like Rand, Kennedy, Bozeman, Warren, Boggess, Baker, and Fields. VDR 2:507-11, 2:1046-50.

Miller-El argues that, if the questioning on minimum punishment were race-neutral, white jurors Hearn and Mazza also should have received it. *See* Petitioner's Brief at 31. But because Miller-El has failed to show that these or any other white jurors were similarly situated to the challenged African-Americans, *see supra* at 18-26, the State's failure to question them in the same manner does not give rise to an inference of purposeful discrimination.

As the court of appeals concluded, prosecutors utilized the legitimate tactic of disparate questioning to identify and remove prospective jurors who had expressed views unfavorable to the State. Therefore, Miller-El's arguments of disparate questioning do not serve to rebut the state trial court's finding of no purposeful discrimination in the State's exercise of peremptory challenges.

D. The State's use of jury shuffles offers little to rebut the state court finding of no discriminatory motive.

Miller-El overstates the significance of the State's requests for jury shuffles and mischaracterizes the record in an attempt to portray the State as scheming to manipulate the jury shuffle process to exclude African-Americans. Contrary to Miller-El's assertions, the State's jury shuffle conduct does not support an inference that "the prosecution was preoccupied with keeping African-American jurors off of petitioner's jury." Petitioner's Brief at 20-21.

Miller-El points to the fact that the State twice requested jury shuffles when the record shows a greater number of African-Americans were seated near the front of the jury panel. While this much is true, the record does not support Miller-El's assumption that the prosecutors' requests were intended to exclude African-Americans from the process. Miller-El contends that prosecutors used the jury shuffle "when it had no information about veniremembers other than race." Petitioner's Brief at 12. But this is not the case. Indeed, many race-neutral traits can be discerned from a visual inspection of a jury panel. *See Ladd v. State*, 3 S.W.2d 547, 563-64 (Tex. Crim. App. 1999) (noting validity of various race-neutral reasons for State's jury shuffle request, including facts that first group

included more individuals with criminal histories (according to records), first group did not include as many individuals wearing coats and ties and did not include as many elderly professional people, and first group included probation officer prosecutor recognized and did not want to offend by striking).

Miller-El also argues that "on two occasions, the State attempted to use procedural motions to undo defense shuffles that moved . . . African-American prospective jurors forward in the seating arrangement." Petitioner's Brief at 19. But he mischaracterizes the record as to each instance.

First, Miller-El complains about the State's objection to a defense shuffle during the third week of jury selection, asserting that "the prosecution formally objected to the defense shuffle only after learning that African-American prospective jurors had been moved forward." Petitioner's Brief at 19 n.5 (internal quotations omitted). The record shows that the State requested and received a shuffle, to which the defense did not object, then the defense requested and received a shuffle. During defense counsel's shuffle in the central jury room, the prosecutor protested, claiming that defense counsel had not shuffled the juror cards thoroughly enough.[29] JA 125, 128. Defense counsel suggested that the prosecutor take it up with the judge. JA 124, 126, 128. After the shuffles were completed, but

[29] During the first three weeks of jury selection, the jury shuffles were conducted in the central jury room without the trial judge present, pursuant to an agreement between the parties consistent with Dallas County practice. Counsel for the State physically conducted the State's shuffles, and counsel for the defense physically conducted the defense's shuffles.

before the newly shuffled venire was reseated, counsel for both the State and the defense went to the judge's chambers; the prosecutor informed the judge that he had a problem with the way the defense had conducted its shuffle, but that he was still investigating the issue. JA 126-27. He lodged no formal objection at that time. JA 127. The panel was seated, then the judge excused the last sixteen jurors to return to the central jury room, conducted some general voir dire, distributed questionnaires, and recessed the panel for lunch. JA 127. At that point, armed with charts prepared by an investigator indicating the minimal amount of shuffling that had occurred as a result of the defense's shuffle, the State formally objected to the defense's shuffle, asking that the panel be either reshuffled or quashed; the prosecutors, in accordance with state law, essentially argued that when the State protested the manner in which defense counsel conducted his shuffle, the parties' agreement to conduct shuffles outside the courtroom terminated.[30] JA 130. Defense counsel charged that the State's objection was racially motivated. JA 129. But, as the prosecutor noted, he had voiced his complaint during the defense's shuffle, before he had even seen the array or knew in what order the veniremen would be seated. JA 129. The trial judge denied the State's request to reshuffle or quash the panel, finding that the State had failed to object to the defense's shuffle in a timely manner. JA 131-32. The State's objection was to the mechanics of the defense's shuffle, not its result. Therefore, it does not support an inference of discriminatory purpose.

[30] *See Latham v. State*, 656 S.W.2d 478, 480 (Tex. Crim. App. 1983); *Stark v. State*, 657 S.W.2d 115, 116 (Tex. Crim. App. 1983).

Second, Miller-El complains about an instance during the fourth week of jury selection. The prosecution had declined to shuffle, then the defense requested and was granted a shuffle. The prosecution then objected to not having the opportunity to exercise its right to a shuffle after seeing the results of the defense's shuffle. JA 621-22. But contrary to Miller-El's assertions, *see* Petitioner's Brief at 19, the record does not reflect the racial composition of the panel either before or after the defense's shuffle. Thus, once again, there is simply no basis to infer discriminatory motive from the State's objection.

Miller-El finally asserts that the Dallas County District Attorney's Office has admitted to using jury shuffles to manipulate the racial composition of juries. *See* Petitioner's Brief at 18, 20. This assertion is apparently based on the testimony of a Dallas County judge that he had once presided over a voir dire proceeding during which a prosecutor (not involved in Miller-El's trial) volunteered that he requested a jury shuffle because a large number of African-Americans were seated near the front of the panel. JA 858-59. Even if this testimony can be construed as an "admission" by the Dallas County District Attorney's Office, the fact that a single unnamed prosecutor not involved in Miller-El's trial used the jury shuffle in a discriminatory manner in another case has little bearing on whether the prosecutors in Miller-El's case acted likewise. In any event, any inference that can be drawn from such evidence cannot overcome the highly persuasive race-neutral explanations

for the State's strikes, explanations which are supported by the record and were credited by the state court.[31]

E. The historical "pattern and practice" evidence offers little to rebut the state court finding of no discriminatory motive.

Unsurprisingly, Miller-El seeks to focus this Court's attention on evidence of past discriminatory practices by the Dallas County District Attorney's Office and of practices by other prosecutors in other cases.[32] The inquiry at *Batson*'s third step, however, is whether the prosecution exercised its peremptory challenges based on race in this case.

The court of appeals did not, as Miller-El contends, discount the relevance of the historical "pattern and practice" evidence presented by Miller-El in state court in

[31] Miller-El complains that the court of appeals failed to engage in a "cumulative analysis" of the evidence presented in support of his claim of purposeful discrimination, *see* Petitioner's Brief at 20-21 & n.7, but a review of the court of appeals' opinion belies the complaint. Though the court of appeals did take each category of evidence in turn to describe it and analyze its import, it concluded ultimately that "none of the four areas of evidence Miller-El based his appeal on indicate, *either collectively or separately*, by clear and convincing evidence that the state court erred." JA 20 (emphasis added). *See also Early v. Packer*, 537 U.S. 3, 9 (2002) (rejecting court of appeals' conclusion that state court had failed to assess cumulative impact of evidence supporting claim, noting that compliance with such requirement "does not demand a formulary statement that [evidence was considered] 'individually and cumulative.' It suffices that that was the fair import of the Court of Appeals' opinion.").

[32] A detailed recitation of the evidence of historical practices presented at the pretrial *Swain* hearing is set forth in respondent's brief on the merits in *Miller-El v. Cockrell*, Res. Br. 23-27, No. 01-7662 (U.S. 2002).

support of his prima facie case. *See* Petitioner's Brief at 15. Indeed, the court below described the evidence presented and noted that "the apparent culture of discrimination that existed in the past in the Dallas County District Attorney's Office and the individual discriminatory practices that may have been practiced during the time of Miller-El's jury selection by some prosecutors are deplorable." JA 7. The court specifically acknowledged, consistent with this Court's directive, that "[t]his historical evidence is relevant to the extent that it could undermine the credibility of the prosecutors' race-neutral reasons." JA 8. It concluded nonetheless that "the general historical evidence does not prove by clear and convincing evidence that the state court's finding of the absence of purposeful discrimination in Miller-El's jury selection was incorrect." JA 8.

Further, the "evidence" Miller-El cites "about policies in place in the D.A.'s office *at the time of petitioner's trial* and evidence about the practices of *the very prosecutors* in petitioner's case" was not even before the state trial judge and thus may not be considered on federal habeas corpus review. Petitioner's Brief at 17 (emphasis in original). *See* 28 U.S.C. § 2254(d)(2) (limiting federal habeas court's review to discerning whether state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.").

Miller-El claims that "both prosecutors involved in [his] jury selection . . . were personally implicated in the Dallas D.A.'s Office's history of racial discrimination," relying upon two state court opinions reversing convictions based on *Batson*. *See* Petitioner's Brief at 15-16 (citing *Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989);

(Dorothy) Miller-El v. State, 790 S.W.2d 351 (Tex. App. – Dallas 1990)). But these opinions, which were issued in 1989 and 1990, were clearly not before the trial court either at the *Swain* hearing in 1986 or at the *Batson* hearing in 1988. For his proposition that "[t]he Sparling manual served as a training tool into the 1980s," Miller-El relies upon a recitation of testimony from a state court opinion in another case, also not before the trial judge, which in fact is in conflict with testimony presented in Miller-El's case that the paper was removed from the manual prior to 1977. *See* JA 774. *See* Petitioner's Brief at 15-16 n.2 (citing *Ex parte Haliburton*, 755 S.W.2d 131, 133 n.4 (Tex. Crim. App. 1988)).[33] Because these opinions were not part of "the evidence presented in the State court proceeding," and in fact did not even exist when the trial court made its determination, they are irrelevant to the federal habeas inquiry.[34]

But even if the opinions were properly before the trial court, they would not impeach the trial judge's decision. Any inference that may be drawn from the mere fact that a prosecutor was involved in a single case, among hundreds he tried, that was reversed under *Batson* is insufficient to overcome the trial judge's finding that the State did not discriminate in this case. To the extent these opinions indicate that these prosecutors discriminated

[33] Even according to *Haliburton*, the Sparling article was last seen in the training manual around 1979 to 1981, more than five years before Miller-El's trial. 755 S.W.2d at 133 n.4.

[34] Also not before the state trial judge were the *Dallas Morning News* articles and a 1963 treatise on jury selection. *See* Petitioner's Brief at 13-14 n.1, 15-15 n.2. The March 9 article was offered at the *Swain* hearing but was excluded as hearsay. JA 823-24, 876-79. Neither the December 21 article nor the 1963 treatise were offered.

against African-Americans in another case,[35] the opinions do little to prove that they did likewise in Miller-El's case, particularly in light of the undisputed race-neutral, case-related reasons for the strikes in this case.

II. Alleged Shortcomings in the State Court's Written Findings and Fact-Finding Process Do Not Lessen the Deference Owed to the State Court Adjudication under 28 U.S.C. § 2254(d)(2) & (e)(1), and Do Not Undermine the Reasonableness of That Adjudication.

Throughout his brief, Miller-El points to alleged deficiencies in the state court written findings and fact-finding process. He ultimately contends that, while a state court's finding of no discrimination must ordinarily be deferred to on federal habeas review, that deference "must be informed by an assessment of the reasonableness of the state courts' methods of analysis." Petitioner's Brief at 45. But this contention finds no support in 28 U.S.C. § 2254.

Section 2254(e)(1) erects a presumption of correctness for state court fact findings and provides that a petitioner has the burden of rebutting that presumption by clear and convincing evidence. Section 2254(d) provides in pertinent part that habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits in State

[35] It should be noted, however, that in *Chambers*, prosecutor Paul Macaluso was found responsible for striking only one of three African-Americans struck by the State. 784 S.W.2d at 31-32. Likewise, the opinion in *(Dorothy) Miller-El* cited by Miller-El does not even reflect that Jim Nelson was involved in the case. 790 S.W.2d at 354-356. The record of that trial indicates that Nelson was lead prosecutor at Dorothy Miller-El's trial, but another prosecutor, Bruce Isaacks, was responsible for jury selection.

court proceedings unless the adjudication of the claim . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The focus is on the state court's ultimate determination, not the process used to arrive at that determination or the form of the state court opinion.[36] Thus, the inquiry under § 2254(d) is not focused upon the state court's fact-finding process or the level of detail in its written findings – or even error in its subsidiary findings. Rather, the question under § 2254(d) is whether the determination itself is unreasonable.

In any event, the "shortcomings" alleged by Miller-El do not undermine the state court's ultimate determination that prosecutors did not discriminate against African-American jurors. Miller-El points out the fact that the state trial judge did not specifically mention the historical "pattern and practice" evidence in his findings. Petitioner's Brief at 44. However, the record belies any contention that the trial judge failed to consider all the evidence properly before him, including the pattern and practice evidence admitted at the *Swain* hearing. At the *Batson* hearing, the trial judge admitted into evidence, over the State's objection on relevancy grounds, the Sparling paper and all the testimony regarding historical jury selection practices in Dallas County originally admitted at the *Swain* hearing. The mere fact that the trial judge did not specifically mention this evidence in his written findings is not a

[36] Notably, the pre-AEDPA version of § 2254(d) did contain a full and fair hearing requirement as a prerequisite to application of the presumption of correctness afforded state court fact findings. 28 U.S.C. § 2254(d) (1994) (repealed 1996). But the 1996 amendments eliminated all references to a "full and fair hearing."

sufficient basis to assume that the trial judge did not consider the evidence. *See* JA 42 ("We adhere to the proposition that a state court need not make detailed findings addressing all the evidence before it."). *See also Early v. Packer*, 537 U.S. 3, 8 (2002) (rejecting court of appeals' conclusion that failure to cite Supreme Court authority rendered state court decision unreasonable). The trial judge apparently determined nonetheless (and reasonably so) that such circumstantial evidence of discriminatory intent, which had no direct bearing on the actions of prosecutors in this case, was insufficient to prove purposeful discrimination in the face of the race-neutral, case-related reasons for the prosecutors' strikes in this case.

Miller-El also faults the state trial court's determination that Miller-El had failed to establish a prima facie case under *Batson*. *See* Petitioner's Brief at 44. However, the trial judge's findings themselves explain this seemingly insupportable determination: The finding of no prima facie showing was based not only on Miller-El's evidence but also on "the explanations for the exercise of the State's peremptory challenges offered at trial and at the retrospective *Batson* hearing." JA 927. The judge explained that his analysis was based on then-existing lower court precedent interpreting the *Batson* decision, which counseled that *Batson* "requires the trial court to consider the State's explanation of the manner in which it employed its challenges prior to making a final determination *as to whether a prima facie case exists. We must therefore direct our trial judges to consider the prosecutor's explanations as part of the process of determining whether a defendant has established a prima facie case of racially discriminatory use of peremptory challenges.*" JA 927-28

(quoting *State v. Antwine*, 743 S.W.2d 51, 64 (Mo. 1987)) (emphasis added). Thus, the trial judge essentially collapsed *Batson*'s first step of determining whether Miller-El had made a prima facie showing into *Batson*'s third step of determining whether Miller-El had proved purposeful discrimination. While the trial judge undoubtedly erred as a matter of law in doing so,[37] this legal error (based on then existing precedent) does not in any way cast doubt on his ul imate determination that Miller-El failed to prove purposeful discrimination.

Miller-El complains also that the court of appeals failed to acknowledge the two-year delay between voir dire and the *Batson* hearing. Petitioner's Brief at 44-45. However, under the facts of this case, that delay does not necessarily impugn the trial court's credibility determinations. As this Court noted, prosecutors proffered their race-neutral reasons for all but one of the challenged strikes contemporaneous with the strikes. JA 37. Though at the time of voir dire, *Swain* did not *require* the trial judge to engage in the three-step analysis later espoused in *Batson,* the record in this case shows that the trial judge did in fact assess the prosecutors' credibility (as required in *Batson*'s third step) contemporaneous with and in the context of the voir dire process.[38] Indeed, at the

[37] It should be noted, however, that *Batson* itself counseled that "[i]n deciding whether the defendant has made the requisite [prima facie] showing, the trial court should consider *all relevant circumstances*." 476 U.S. at 96 (emphasis added); *see also id.* at 94 (noting that a defendant makes out a prima facie case "by showing that *the totality of the relevant facts* gives rise to an inference of discriminatory purpose") (emphasis added).

[38] As the trial judge noted at the pretrial *Swain* hearing conducted *immediately after* jury selection in this case, "And the State, as I recall, on every single strike where it was challenged by the Defense they

(Continued on following page)

subsequent *Batson* hearing, the State merely asked that the trial judge (the same trial judge who had presided over the voir dire) take judicial notice of that prior testimony. JA 917. This case therefore stands in marked contrast to other cases tried during the same time period in which prosecutors were not required to proffer their reasons for strikes until years after the voir dire at issue took place. *See, e.g., Chambers v. State*, 784 S.W.2d 29 (Tex. Crim. App. 1989).

Finally, Miller-El faults the state trial court for finding no disparate questioning. *See* Petitioner's Brief at 44. Significantly, however, Miller-El did not advance his disparate questioning argument in support of his *Batson* claim until federal habeas proceedings. Nonetheless, the state trial court specifically found, based on its own recollections and on its review of the entire voir dire record, that "no disparate prosecutorial examination of any of the veniremen in question has been shown." JA 929. This finding is properly interpreted, in context, as a finding that Miller-El had shown no disparate questioning *based on race*. Obviously, prosecutors did not use the same script of questions with all prospective jurors regardless of the views reflected in their questionnaires and voir dire responses. The trial judge was certainly aware of this but found, nonetheless, that Miller-El had failed to show disparate questioning based on race.[39]

stated to the satisfaction of the Court at least, that the reason for striking a particular juror was not racially motivated." JA 805-06. *See also* JA 892 ("I felt that this Court's determination of certain objections made by the defense during that time resolved the issue of my finding on discrimination. . . .").

[39] This interpretation is further supported by the fact that the State acknowledged *before the state trial judge* that it had used

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Miller-El's complaint against the state court finding here is analogous to an issue presented to the Court in *Woodford v. Visciotti*, 537 U.S. 19 (2002). There, the Court determined that the court of appeals' "readiness to attribute error" based on the state court's use of a "shorthand reference" to the applicable standard was "inconsistent with the presumption that state courts know and follow the law" and incompatible with § 2254, "which demands that state-court decision be given the benefit of the doubt." *Id.* at 23-24. Similarly, the state court's finding that "no disparate prosecutorial examination of any of the veniremen in question has been shown," while imprecise, does not render unreasonable the state court's finding of no purposeful discrimination.

III. Miller-El Is Not Entitled to Habeas Corpus Relief.

Under *Batson*, the ultimate burden of persuading the court that the State's peremptory challenges are attributable to a discriminatory purpose lies with and never shifts from the defendant. 476 U.S. at 94 n.18 (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 252-56); *Purkett v. Elem*, 514 U.S. 765, 768 (1995). Because Miller-El failed to satisfy his burden of proving purposeful discrimination, the trial judge found that the prosecutors did not act with discriminatory purpose.

On habeas review, "[i]t is not enough that a federal habeas court . . . is left with a firm conviction that the state court was erroneous." *Lockyer v. Andrade*, 538 U.S.

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different lines of questioning with different jurors, but that this was based on the jurors' views, not their race. JA 920-21.

63, 75 (2003) (internal citations and quotation marks omitted). Further, "the range of reasonable judgment can depend in part on the nature of the relevant rule. . . . The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough v. Alvarado*, 124 S. Ct. 2140, 2149 (2004). Like the "in custody" requirement considered by the Court in *Alvarado, Batson* is a general rule calling for an overall objective assessment of many different facts supporting both sides. *Id.* at 2149-50. Though Miller-El asserts, notwithstanding the state court's contrary conclusion, that discrimination took place, "it is at least reasonable to conclude that [it did] not, which means that the state court's determination to that effect must stand." *Early v. Packer*, 537 U.S. at 11. As the lower court held, Miller-El has failed to demonstrate that the state court finding of no purposeful discrimination is unreasonable in light of the record, and has likewise failed to rebut the finding by clear and convincing evidence.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

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